Filed 6/29/09 Marriage of Gray CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of GREGORY and LORRAINE GRAY.	B210781
GREGORY GRAY, Plaintiff and Appellant, v. LORRAINE GRAY, Defendant and Respondent.	(Los Angeles County Super. Ct. No. GD 035500)

APPEAL from an order of the Superior Court of Los Angeles County, Norri Anne Walla, Commissioner. Affirmed.

Law Office of Jeanne Collachia and Jeanne Collachia for Appellant.

Law Offices of Gary W. Kearney and Gary W. Kearney and Respondent.

* * * * * *

A judgment dissolving the marriage between Gregory and Lorraine Gray, based on a marital settlement agreement (MSA), was entered on May 12, 2005. On January 10, 2008, Gregory[1] filed a motion to set aside the MSA and to reallocate nonpension community assets; Gregory alleged that Lorraine had breached her fiduciary obligations toward him and that she had committed fraud. The motion was denied and this appeal followed. We affirm.

BACKGROUND

Gregory and Lorraine were married for over 26 years and have one son, Thomas, born in 1989. Gregory is a psychiatrist and at one point in his career was chairman of psychiatry at Charles R. Drew University of Medicine and Science; he is now in private practice as a psychiatrist. Lorraine has a master's degree in home economics and is a registered dietician. Beginning in 2003, Gregory began to experience various health problems; the couple separated in October 2003. Gregory relinquished the chairmanship at the university in May 2004 and started to establish a private practice.

According to Gregory's declaration submitted in support of the motion to set aside the MSA, he agreed in the MSA to have the family residence, located in San Marino, allocated to Lorraine so that Thomas could continue to live in the family home and attend San Marino High School.

The marital estate was composed of the San Marino residence and a number of savings accounts, mutual funds, retirement accounts and cars. The value assigned to the residence was between $830,000 and $835,000 with a first mortgage of $230,938 for a net value, in round figures, of $600,000; all of this was allocated to Lorraine. The valuation given the residence in the MSA is one of principal issues in this appeal.

The balance of the marital estate was valued at $1,175,149. The largest single item was a TIAA-CREF retirement account of $621,608, which was split evenly at $310,804. The nonreal property estate of $1,175,149, including the TIAA-CREF

---

[1] As is usual, we will refer to the parties by their first names only for the sake of brevity and convenience and intend no disrespect thereby.

account, was divided with $688,709 for Gregory and $486,440 for Lorraine. Gregory points out that the division of the marital estate, including the residence, gave Lorraine $1,086,440 or 61 percent and $688,709 or 39 percent to Gregory.

Gregory was required to pay $1,784 in child and $3,181 in spousal support.

RELIEF FROM A JUDGMENT DISSOLVING A MARRIAGE

We digress at this point to set forth the provisions of Family Code sections 2120-2129,[2] which were enacted in 1993. We do so in order to set forth the appropriate statutory bases for Gregory's motion to vacate the MSA and to reallocate community property.

We note at the outset that Gregory's motion, filed on January 10, 2008, was labeled as one for "modification" and to "set aside MSA." Neither label is correct. Since a judgment was entered in this case on May 12, 2005, the ground rule is that the aspects of the judgment dealing with property division, as opposed spousal and child support, are final and are not subject to modification. (*Leupe v. Leupe* (1942) 21 Cal.2d 145, 150; *Ettlinger v. Ettlinger* (1935) 3 Cal.2d 172, 178; see generally 11 Witkin, Summary of Cal. Law (10 ed. 2005) Husband and Wife, § 355, pp. 459-460.) This is in accord with the fundamental principle that a judgment, which is final because the time to appeal from the judgment has lapsed, is not subject to modification and revision.

Section 2120 et seq., which provide for relief from this fundamental rule, was enacted for reasons that are set forth in section 2120.[3] For purposes of convenience, we

---

[2] All statutory references, unless otherwise noted, are to the Family Code.

[3] Section 2120 provides:

"The Legislature finds and declares the following:

"(a) The State of California has a strong policy of ensuring the division of community and quasi-community property in the dissolution of a marriage as set forth in Division 7 (commencing with Section 2500), and of providing for fair and sufficient child and spousal support awards. These policy goals can only be implemented with full disclosure of community, quasi-community, and separate assets, liabilities, income, and

will refer from time to time to sections 2120-2129 collectively by the acronym of the title given to this chapter of the Family Code, which is "Relief from Judgment," or "RFJ." In substance, appellant is seeking relief under the RFJ, even though his motion is mistakenly labeled as one to modify and/or set aside the MSA.

Broadly put, the provisions of the RFJ afford relief beyond the six-month time limit of Code of Civil Procedure section 473.[4]

Two statutory provisions are potentially pertinent to the contentions advanced in appellant's petition. These provisions are subdivision (d) of section 2107 and subdivision (a) of section 2122. The first of these provisions is not in the RFJ but is incorporated in the RFJ by reference. These two provisions are set forth below:

"If a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error." (§ 2107,

---

expenses, as provided in Chapter 9 (commencing with Section 2100), and decisions freely and knowingly made.

"(b) It occasionally happens that the division of property or the award of support, whether made as a result of agreement or trial, is inequitable when made due to the nondisclosure or other misconduct of one of the parties.

"(c) The public policy of assuring finality of judgments must be balanced against the public interest in ensuring proper division of marital property, in ensuring sufficient support awards, and in deterring misconduct.

"(d) The law governing the circumstances under which a judgment can be set aside, after the time for relief under Section 473 of the Code of Civil Procedure has passed, has been the subject of considerable confusion which has led to increased litigation and unpredictable and inconsistent decisions at the trial and appellate levels."

[4] "In proceedings for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof, adjudicating support or division of property, after the six-month time limit of Section 473 of the Code of Civil Procedure has run, based on the grounds, and within the time limits, provided in this chapter." (§ 2121, subd. (a).)

subd. (d).) Subdivision (f) of section 2122 of the RFJ provides that failure to comply with section 2107, subdivision (d) is grounds for relief under the RFJ.

The second provision at issue in this appeal is contained in the RFJ:

"Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud." (§ 2122, subd. (a).)

APPELLANT'S PETITION

Appellant's petition is supported by his declaration of 16 pages in which he sets forth a substantial number of complaints about Lorraine's disclosures, and lack thereof, of her financial condition both before and after the MSA was filed and the judgment dissolving the marriage was entered. These alleged shortcomings in Lorraine's disclosures, and the allegedly erroneous valuation of the San Marino residence, came to light in litigation that commenced after the judgment was entered. This litigation was sparked by Gregory's attempt, initiated in March 2006, to modify spousal support.

Gregory's list of grievances, set forth in his declaration, about Lorraine's disclosures is a mix of complaints about her conduct before and after the judgment was entered; Gregory's declaration also impugns, citing anecdotal evidence, Lorraine's integrity. Lorraine's alleged lack of integrity, as a general matter, is not a matter for this or any other court, nor are her alleged failings after the judgment was entered relevant in terms of subdivision (d) of section 2107 and subdivision (a) of section 2122. These are the provisions under which Gregory may be entitled to relief, *if* he is entitled to relief.

In any event, even Gregory's declaration limits the requested relief to two items. These are the alleged undervaluation of the San Marino residence and a bank account at Wells Fargo, which had a balance of $29,632.38 at the time the MSA was executed in January 2005 (hereafter the Wells Fargo account), which Lorraine allegedly failed to disclose prior to the execution of the MSA and the entry of judgment.

On appeal, Gregory contends that the San Marino residence was undervalued in the MSA and that the true value of this property at the time the MSA was entered into was $1,350,000. In addition, Gregory contends that Lorraine failed to disclose at the time the MSA was entered into that she had saved "$29,000 from her temporary spousal support." This appears to be a reference to the Wells Fargo account. Gregory also contends that in October 2007 she understated her savings, that she failed to disclose in 2007 that she was making additional payments on the mortgage and that she withdrew, after the judgment, $10,000 from a bank account that had been awarded to Gregory.

THE TRIAL COURT'S RULING

Although it is not germane to the issues on appeal, we note that the trial court reduced spousal support to $1,500 per month and that Lorraine agreed to this reduction, i.e., did not contest it. This order was based on Gregory's level of income and on Lorraine's ability to earn money as a dietician.

The trial court found that Lorraine had disclosed the Wells Fargo account in the schedule of assets and debts filed in conjunction with the MSA and the resulting judgment.

The court also found, based on Gregory's handwriting found in tax bills for the San Marino property for 2003 and 2004, that he knew that this property was valued in 2003/2004 at $831,995. The court found that there was no evidence that Lorraine knew of any other value for this property than the one reflected in the MSA. In a finding that common sense supports, the court concluded that Gregory, "a well-educated doctor, had the ability to obtain an appraisal of the property prior to signing of the MSA" and that Gregory would have done so, if he thought that the valuation of the property was too low. It is evident that Gregory, who had lived in the San Marino property for several years, was in as good a position to form a reliable opinion about the property as Lorraine. As the trial court noted, he had over one and a half months to review all aspects of the MSA before judgment was entered but, at or before the time the judgment was entered, he requested no revisions.

The court concluded that "no prejudice occurred that materially affected the MSA." The court denied the motion to set aside the MSA and to reallocate community property.

DISCUSSION

1. There Was No Violation of Subdivision (d) of Section 2107

Subdivision (d) of section 2107 requires the court to set aside the judgment if parties to a judgment of the dissolution of a marriage have failed to comply with all disclosure requirements.

Gregory contends that Lorraine failed to disclose the Wells Fargo account prior to the execution of the MSA and the entry of judgment.

In making this claim, Gregory relies on a statement filed by Lorraine on or about October 11, 2007, in which she states that in June 2004 she opened the Wells Fargo account for the purpose of banking the temporary child and spousal support she was receiving. In this statement, Lorraine avers that since the judgment she saved approximately $29,000 from these temporary support payments.

On appeal, Gregory has retreated from the position that he took in the trial court, which was that Lorraine had concealed the Wells Fargo account, i.e., that the funds in this account were community property that Lorraine had concealed. Instead, Gregory claims on appeal that Lorraine has "failed to disclose that she had saved $29,000 from her temporary spousal support."

It is manifest that postjudgment savings from temporary support payments could not be disclosed in the MSA or the judgment. It is similarly obvious that savings from temporary support payments are not community property.

Gregory's contention that Lorraine failed to make full disclosure, based on the existence of the Wells Fargo account, is without merit. We reject it, as did the trial court.

2. There Was No Fraud and Hence No Violation of Subdivision (a) of Section 2122

Under subdivision (a) of section 2122, there is "[a]ctual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding." In essence, this states the rule that relief will be

granted only if the fraud is extrinsic. (See generally 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 225, pp. 832-833.)

It is clear that Gregory's claim of fraud falls far short of this standard. Gregory claims that Lorraine had a fiduciary obligation to make full disclosure of the value of the residence and that Lorraine was in a better position to know the value of the house than Gregory. Specifically, Gregory states that he moved out of the house in October 2003 and the real estate bubble "began late in 2003" and was "in full force by January 2005." According to Gregory, Lorraine would have known this because she had access to flyers and to the for sale signs posted about the neighborhood.

We agree that Lorraine had an obligation to make full disclosure and we go on to conclude, as did the trial court, that she fulfilled that obligation. But we do not agree that Lorraine's alleged superior knowledge of the real estate bubble constitutes fraud for the purposes of subdivision (a) of section 2122. In no way does this amount to a claim that Gregory was "prevented from fully participating in the proceeding." (§ 2122, subd. (a).) On the contrary, there is every indication that he did, indeed, fully participate in the proceedings leading up to the MSA and the judgment of dissolution.

Gregory claims that it is "certain" that he did not know the true value of the house and that, even though Lorraine stated in her declaration that she believed that the house was worth $831,000, she was "willfully blind" to the true value of the house. Even if we give full faith and credit to these improbable assertions, they do not amount to fraud under section 2122, subdivision (a).

Contrary to Gregory's claim, *In re Marriage of Brewer & Federici* (2001) 93 Cal.App.4th 1334 is of no assistance to Gregory. The nub of the matter in that case was that a marital settlement agreement had been concluded on the express understanding that Brewer's interest in a *single* retirement and pension plan was $168,561. It turned out, however, that the total value of *two* retirement plans was in excess of $500,000. (*Id.* at p. 1346.) Brewer had misled Federici into believing that she had only one plan, she had failed to provide all the documentation in her possession, she had undervalued the plan that she did disclose and she was in a superior position when it came to obtaining full and

accurate information about her own pension and retirement plans. (*Id.* at pp. 1347-1348.) It comes as no surprise that the trial and appellate courts concluded that Brewer had failed to make truthful, accurate and complete disclosures.

The contrast between *In re Marriage of Brewer & Federici* and this case could not be greater. In this case, we have a valuation of the residence prepared by a retained expert after the marital settlement agreement and judgment of dissolution, which supposedly represents the value of the residence when the agreement was concluded. Obviously, no one could disclose a valuation at the time of the MSA that had not yet been made, nor is it necessarily true that one expert's valuation retained by one of the parties is dispositive. Although Gregory claims that, like Brewer, Lorraine was in a superior position when it came to the value of the residence, Gregory is unable to provide a single cogent reason why this is so. The contrast between the value of a single family residence, on the one hand, and the deception practiced by Brewer about her pension and retirement plans, on the other, is too stark to require elaboration.

The fact that Gregory's assertions, even if true, do not amount to extrinsic fraud ends the matter. We go on, however, to reject the suggestion that Gregory was ignorant of the true value of the house. If we were faced with a manual laborer with a minimal education living in a house of lesser stature than that of a psychiatrist living in San Marino in a house worth over $800,000, we might be inclined to suspend or mitigate our disbelief about Gregory's claim of ignorance. We cannot, however, do so in this case.

3. The Remainder of Gregory's Contentions Are Not Cognizable in This Appeal

Gregory also contends that in October 2007 Lorraine understated her savings, that she failed to disclose in 2007 that she was making additional payments on the mortgage and that she withdrew, after the judgment, $10,000 from a bank account that had been awarded to Gregory. Specifically, as to the last claim, Gregory claims that Lorraine was awarded $80,000 from a premium savings account at Wells Fargo bank (not the Wells Fargo account we have previously discussed) but that she withdrew not only $80,000, but an additional $10,237.81 from this account.

Section 2122 of the RFJ provides that a judgment may be set aside for actual fraud, perjury, duress, mental incapacity, mistake of law or fact in a stipulated judgment, and a failure to disclose. None of the claims set forth in the preceding paragraph qualifies under any of the provisions of section 2122. Thus, they are not cognizable in these proceedings.

Gregory requests that we take judicial notice of various documents relating to real estate prices. The topic of real estate prices is immaterial and the documents submitted are not suitable for judicial notice. This request is denied.

DISPOSITION

The order denying appellant's motion for relief under Family Code section 2122 is affirmed. Respondent is to recover her costs on appeal.

FLIER, Acting P. J.

We concur:

BIGELOW, J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.